

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

75-7394

In The
United States Court of Appeals
For the Second Circuit

JOSEPH A. SAN FILIPPO, as President of Local #72, United Brotherhood of Carpenters and Joiners of America, and ROBERT S. MURPHY, as Secretary of Local #72, United Brotherhood of Carpenters and Joiners of America, and LOCAL #72, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Plaintiffs-Appellants,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Defendant-Appellee.

REPLY BRIEF OF APPELLANTS



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REPLY BRIEF OF APPELLANTS

POINT I

Contrary to defendant's position, the District Court's denial of defendant's motion to dismiss the complaint is not before this Court on this appeal.

This is an appeal by plaintiffs, pursuant to the notice of appeal filed June 20, 1975 (A120) from so much of the order of the United States District Court, Western District of New York, dated June 18, 1975 (Burke, U.S.D.J.) as denied plaintiffs' motion for a preliminary injunction.

On July 18, 1975, this Court granted plaintiffs' motion for an injunction pending appeal and ordered that this appeal be

expedited. Subsequent thereto, on July 21, 1975, defendant filed a notice of appeal, purporting to take an appeal from that portion of the District Court's order of June 18, 1975 that denied defendant's motion to dismiss the complaint.

It is axiomatic, of course, that this Court has jurisdiction of appeals from (1) final orders of the district courts and (2) those interlocutory orders specified by statute to be appealable. 28 U.S.C. §§1291 & 1292(a).

It is just as clear that an order denying a motion to dismiss the complaint is non-final and not appealable by right. *Pepsico, Inc. v. F.T.C.*, 472 F.2d 179, 185 (2nd Cir. 1972), cert. denied 414 U.S. 876 (1973); *American Concrete Agr. Pipe Assn. v. No-Joint Concrete Pipe Co.*, 331 F.2d 706 (9th Cir. 1964); *Boeing Co. v. International Union, U.A., A & A Imp. Workers*, 370 F.2d 969 (3rd Cir. 1967).

Accordingly, that portion of the District Court's order dated June 18, 1975 (A118-119) denying defendant's motion to dismiss the complaint is not a subject of this appeal.

The District Court's denial of defendant's motion to dismiss, coupled with the argument and authorities set forth at pages 7-18 of the Brief of Appellants, establishes that plaintiffs' claims are meritorious. Moreover, defendant has not refuted plaintiffs' assertions that a preliminary injunction is necessary to prevent irreparable injury to plaintiffs and that issuance of a preliminary injunction will occasion no harm to defendant. Plaintiffs have, therefore, established their right to a preliminary injunction pending the final determination of this action.

POINT II

The injunction pending appeal now in effect by order of this Court dated July 18, 1975 should be continued pending the determination of this appeal.

By order dated July 18, 1975, this Court granted plaintiffs' motion for an injunction pending appeal to the extent of enjoining the United Brotherhood from effectuating the challenged directive of the United Brotherhood which is the subject of his action "until argument of the appeal[1]."

Plaintiffs submit that principles of law, equity and logic dictate that the injunction now in effect be continued until this appeal is determined.

The standard to be applied in determining if an injunction pending appeal should issue is well-settled and free of doubt. *Virginia Petroleum Job. Assn. v. Federal Power Comm.*, 259 F.2d 921, 925 (D.C. Cir. 1958):

"... Essentially, four factors influence our decision: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? ... (2) Has the petitioner shown that without such relief, it will be irreparably injured? ... (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? ... (4) Where lies the public interest?"

In Accord:

Belcher v. Birmingham Trust National Bank,
395 F.2d 685 (5th Cir. 1968);
Shinholt v. Angle, 90 F.2d 297 (5th Cir. 1937),
cert. denied 302 U.S. 719 (1938);
First-Citizens Bank & Trust Co. v. Camp,
432 F.2d 481 (4th Cir. 1970).

The Brief of Appellants establishes (1) that plaintiffs are likely to prevail on the merits of this appeal, (2) that plaintiffs would suffer irreparable injury in the absence of the preliminary

injunction pending the determination of this action, and hence in the absence of an injunction pending the determination of this appeal, and (3) the absence of harm that defendant will suffer by the grant of the preliminary injunction, and the injunction pending the determination of this appeal. (The public interest, a factor in actions involving regulatory statutes, is not involved in this action).

Accordingly, plaintiffs are entitled to an order, at the time of argument, continuing the injunction pending appeal now in effect until the determination of this appeal.

CONCLUSION

This action should be remanded to the District Court with directions that a preliminary injunction issue, enjoining defendant from effectuating the challenged directive, pending the determination of this action. The injunction pending appeal now in effect should be continued pending the determination of this appeal.

Dated: Rochester, New York

August 6, 1975

Respectfully submitted,

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August 7, 1975

Re: Sanfilipo et al vs United Brotherhood of Carpenters and Joiners
of America

State of New York)
County of Monroe) ss.
City of Rochester)

Johnson D. Hay

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Attorney(s) for

Plaintiffs-Appellants

(s)he personally served three (3) copies of the printed Record Brief Appendix
of the above entitled case addressed to:

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Buffalo, NY 14202

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